IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 498, 499

AMERICAN LOCOMOTIVE COMPANY,
Petitioner,

vs.

CHEMICAL RESEARCH CORPORATION,
Respondent.

AMERICAN LOCOMOTIVE COMPANY,
Petitioner,

vs.

GYRO PROCESS COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF

I

Respondent's brief studiously avoids the determining issue of law in conflict between Courts of Appeals, to wit: the meaning of the word "default" in the proviso in Section 3 of the National Arbitration Act.

The Court of Appeals below has acknowledged that its interpretation gives a different and "broader meaning than is attributed to" that proviso in the *Kulukundis* case

by the Court of Appeals for the Second Circuit. On the strength of that different interpretation, the court below has found "default"; and that different interpretation was obviously necessary to that finding.

We submit that this Supreme Court should resolve this conflict as to the meaning in law of this statutory exception to the present broad national public policy favoring arbitration, lest that policy become hobbled and vitiated by an erroneous interpretation of the proviso.

II

Respondent's brief further avoids the further controlling consideration of law that, irrespective of this conflict as to the interpretation of the word "default," defendant, which had promptly pleaded its right of arbitration in its answer to the original complaint, cannot possibly be held on any theory of law to have forfeited its rights "of equitable defense or cross-bill" while the action was still in the pleading stage.

The respondent gives no reason why *it* should enjoy the privilege of keeping this action in the pleading stage for seven leisurely years, while it formulated a massive new complaint, but the petitioner should be denied its rights under Rules 12 and 15(a), and while the pleading stage was fully open to it, to make immediate response in the form of an application under Section 3 of the Arbitration Act,—an application which this Court has called an "equitable defense or cross-bill." (See our Main Brief, Point II, p. 18.)

The respondent deigns to notice this matter of law only for a third of a page near the end of its brief (p. 28). Yet involved in it is the potential of such a restriction of the National Arbitration Act by judicial expansion of an exception as to cripple, if not stultify, the broad public policy and purpose of the Act itself.

III

Respondent nowhere denies that Section 3 relates to a stay of *trial* only, leaving interlocutory proceedings to go on as usual (*Anaconda* and *Mitsui* cases, Main Brief, Point III); yet respondent continually reiterates, as constituting default, that petitioner participated in interlocutory proceedings. Petitioner in fact emphasizes the 40 consent orders extending petitioner's time to plead while respondent reformulated its pleadings. Yet these consent orders were obviously not waivers by petitioner of any of its rights, but, on the contrary, waivers *by the respondent* of lapse of time in petitioner's pleadings, waivers given by respondent not of courtesy to petitioner, but in recognition of the tentative character of respondent's then current complaint.

IV

There is no occasion to repeat here what is obvious and what we showed in our Main Brief (pp. 7, 19), to wit: that a 159-page amended and supplemental complaint asking for $36,285,000 is essentially different from a 15-page complaint asking for $5,250,000 damages.

But whether it is or not, the fact remains that respondent kept the case in the pleading stage for over seven years in order that it might, according to its own avowals, "elaborate and complete" its complaint, provide "a comprehensive accurate complaint," and set forth new "issues which may at some time after this date be injected into the case by amendments" (Main Brief, pp. 6-7).

Hence, respondent cannot be heard to say at this time that petitioner should be denied rights available to it according to law when served with an amended and supplemental pleading, on the unheard-of ground that respondent's own amendments were unnecessary or insubstantial.

The defendant had at the very outset and in its response to the original complaint recorded its insistence that arbitration was a condition precedent. It never withdrew that defense. On the contrary, during the period while the plaintiff was keeping the pleading stage open for service of its final amended complaint, the defendant obtained orders for discovery in substantiation of its defense that arbitration was a condition precedent. (Main Brief, pp. 28, 29.)

When, after seven years, the plaintiff finally razed its former pleading and replaced it with its present new and vast structure, the defendant had, as a matter of law, the right to respond by repleading its rights under the arbitration covenants and by applying for a stay in furtherance thereof.

V

Nor does respondent deign to deal with the point that from June 16, 1941 when the Court ruled on disputes as to the scope of the discovery (ruling largely in petitioner's favor), respondent took no action in its own discovery until August 17, 1946—a period of over five years (R. 358-359). Yet respondent accuses petitioner of delay!

Respectfully submitted,

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